(2)

No. 92-133

Supreme Court, U.S.
FILED
AUG 21 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

MICHAEL J. KOLBECK,

Petitioner

v.

GENERAL MOTORS CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Petition for Writ of Certiorari presents the following questions for review, neither of which was presented to the court below:

WHETHER THE THIRD CIRCUIT COURT'S REFUSAL TO ALLOW PETITIONER TO SUGGEST *IN BANC* RECONSIDERATION OF A DENIED REQUEST FOR EXTENSION OF TIME TO FILE FOR REHEARING BY THE THIRD CIRCUIT COURT OF APPEALS CONSTITUTES A DEPRIVATION OF PETITIONER'S DUE PROCESS RIGHTS.

WHETHER DENIAL OF PETITIONER'S PETITION REQUESTING AN EXTENSION OF TIME TO FILE FOR REHEARING AND DENIAL OF APPELLANT'S PETITION TO RECALL THE MANDATE ISSUED BY THE THIRD CIRCUIT COURT OF APPEALS WERE VIOLATIONS OF PETITIONER'S DUE PROCESS RIGHTS.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

Respondent in this matter is General Motors Corporation. There is no "parent company" of General Motors Corporation. The following are subsidiary companies (other than wholly-owned subsidiaries) of General Motors Corporation:

AeroVironment Inc. (USA)

Alambrados Automatrices. S.A. de C.V. (Mexico)

Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)

AMBRAKE Corporation (USA)

Applied Intelligence Systems, Inc. (USA)

Aralmex, S.A. de C.V. (Mexico)

Automotive Polymer Based Composites Joint Venture and Development Partnership

Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)

Avis, Inc. (U.S.A.)

Bujias Mexicanas, S.A. de C.V. (Mexico)

Cableados de Juarez, S.A. de C.V. (Mexico)

CABLESA-Industria de Componentes Electricos Limitada (Portugal)

Calsonic Harrison Co., Ltd. (Japan)

Cami Automotive Inc. (Canada)

CEI Co., Ltd. (USA)

Comau Productivity Systems, Inc. (USA)

Compagnie De Faisceaux Tunisian International S.A. (Tunisia)

Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)

Componentes Delfa, C.A. (Venezuela)

Componentes Mexicanos de Matamoros, S.A. de C.V. (Mexico)

Conductores y Componentes Electricos, de Juarez, S.A. de C.V. (Mexico)

Convesco Vehicle Sales GmbH (West Germany)

Daewoo Automotive Components, Ltd. (Korea)

Delco Electronics Corporation (USA)

Delkor Battery Company, Ltd. (Korea)

Delmex de Juarez, S.A. de C.V. (Mexico)

Delredo, S.A. de C.V. (Mexico)

Detroit Deere Corporation (USA)

Detroit Diesel Corporation (USA)

DEB – Componentes Automotivos S.A. (Brazil)

DEMS Industries, Ltd. (Korea)

Diffracto Limited (Canada)

DR DE CHIHUAHUA, S.A. de C.V. (Mexico)

Electronic Data Systems Corporation (USA)

Ensamble de Cables Y Componentes, S.A. de C.V. (Mexico)

Fabrica Columbiana de Automotores S.A. ("Colomotores") (Columbia)

General Motors de Brasil, Ltda. (Brazil)

General Motors de Colombia S.A. (Colombia)

General Motors de Ecuador S.A. (Ecuador)

General Motors de Mexico, S.A. de C.V. (Mexico)

General Motors Egypt, S.A.E. (Egypt)

General Motors Espana, S.A. (Spain)

General Motors (Europe) AG (Switzerland)

General Motors France (France)

General Motors Hellas, A.B.E.E. (Greece)

General Motors Iran Limited (Iran)

General Motors Kenya Limited (Kenya)

General Motors del Peru S.A. (Peru)

General Motors de Portugal, Limitada (Portugal)

Genie Mecanique Zairose, S.A.R.L. (Zaire)

GM Allison Japan Limited (Japan)

GMFanuc Robotics Corporation (USA)

Hua Tang Automotive Corporation (Rep. of China)

IBC Vehicles Limited (England)

Ilmor Engineering, Ltd. (England)

Industries Mecaniques Maghrebines, S.A. (Tunisia)

Industrija Delova Automobila, Kikinda (Yugoslavia)

INLAN-Industria de Componentes Mecanicos, Lda. (Portugal)

Isuzu Motors Limited (Japan)

Isuzu Motors Overseas Distribution Corp. (Japan)

Kabelwerke Reinshagen GmbH (West Germany)

Kabelwerke Reinshagen Werk West Berlin GmbH (West Germany)

Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

Koram Plastics Company, Ltd. (Korea)

Metal Casting Technology, Inc. (USA)

Motor Enterprises, Inc. (USA)

New United Motor Manufacturing, Inc. (USA)

New Venture Gear, Inc. (USA)

NHK Inland Corporation (Japan)

Omnibus BB Transportes, S.A. (Ecuador)

Packard Electric Ireland Limited (Ireland)

Perceptron Inc. (USA)

Promotora de Partes Electronics Automotrices (Mexic

P.T. Mesin Isuzu Indonesia (Indonesia)

Rimir, S.A. de C.V. (Mexico)

Rio Bravo Electricos, S.A. de C.V. (Mexico)

Robotic Vision Systems, Inc. (USA)

Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)

Shinsung Packard Company, Ltd. (S. Korea)

Sistemas Electricos y Commutadores, S.A. de C.V. (Mexico)

Sung San Company, Ltd. (Korea)

Suzuki Motor Co., Ltd. (Japan)

Tactical Truck Corporation (USA)

Teknowledge, Inc. (USA)

TEREX Equipment Limited (Scotland)

Vauxhall Motors Limited (England)

Vestiduras Fronterizas, S.A. de C.V. (Mexico)

View Engineering (USA)

Volvo GM Heavy Truck Corporation (USA)

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STATEMENT OF THE CASE

Respondent, General Motors Corporation, accepts petitioner's recital of the relevant procedural history appearing at pages 5-6 of Michael Kolbeck's Petition for Writ of Certiorari (referred to herein as "Petition"). The issue of a "seat belt defense," Petition at 6, specifically required interpretation of the Pennsylvania Occupant Protection Act, 75 Pa.C.S.A. §§ 4581-85, by the lower federal courts. *See* Petition at 6; Appendix to Petition, A-12 through A-28 inclusive. Respondent does not accept petitioner's statement of the reasons offered to explain his failure to timely file a petition for rehearing in banc. Respondent also disagrees with petitioner's interpretation of the decision in *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430 (3d Cir. 1992). *See* Petition at 7-8 and Argument, *infra*.

Contrary to petitioner's statement of the case, Mr. Kolbeck was allowed to file a "suggestion for rehearing" in banc which was ultimately reviewed and rejected by a three-judge panel of the court of appeals. Curiously, petitioner omitted from his Appendix the "Petition for Rehearing In Banc" filed April 27, 1992, (acknowledged by the Clerk's letter of April 28, 1992, which appears at A-8 and A-9 of the Appendix) which expressly requested rehearing in banc. Reference of such matters to a three-judge panel was appropriate pursuant to 28 U.S.C. § 46 and Internal Operating Procedure 10.3.3 of the Court of Appeals.[1]

Kolbeck's Petition for Writ of Certiorari, served on counsel for respondent on July 22, 1992, presents for review in this Court two questions not preserved for appellate review below. Each suggests a due process

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1. The relevant statutory provisions appear in the Petition at 3-4. Briefly, 28 U.S.C. § 46(c) authorizes rehearing in banc in the courts of appeals where so ordered by the judges of the circuit. Chapter 10.3.3 of the Third Circuit's Internal Operating Procedures governs submission of certain motions for reconsideration or rehearing.

violation which was neither presented to nor decided by the court of appeals.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari inaccurately states that petitioner was not allowed to "suggest" the need for rehearing in banc in the court of appeals. Kolbeck's Petition for Rehearing In Banc, though filed several months out-of-time, was presented to and rejected by an appropriately constituted panel of the court below. The constitutional arguments presented for the first time here not only lack support in case precedent, but seek to excuse petitioner's failure to timely file a petition for rehearing in banc in the court below. Finally, the court of appeals properly rejected the merits of petitioner's underlying state law claims which, on their face, would not justify the exercise of discretionary jurisdiction by this Court.

ARGUMENT

I. The Procedures Adopted By The Court Of Appeals Allowed Petitioner, Who Purposefully Elected Not To File A Timely Petition For Rehearing In Banc, The Opportunity To Request Such Rehearing Out-Of-Time And To Present Legal Argument To A Three-Judge Panel Of The Court.

Petitioner, Michael Kolbeck, whose liability claims against General Motors Corporation have been rejected by a district court jury and by the United States Court of Appeals for the Third Circuit, now seeks to expand both settled constitutional precedent and federal appellate procedure to excuse his admitted failure to timely file a petition for rehearing in banc in the lower court.

Kolbeck's petition makes superficial reference to numerous constitutional provisions yet offers not a single precedent to support the central proposition of his

case, namely, that a litigant has a constitutionally protected interest sufficient to compel review of an untimely filed petition for rehearing in banc. This argument lacks support in the Constitution, in common law and in common sense as well. It is also contradicted in fact by the lower court record.

Kolbeck's petition argues that the court of appeals, acting through its clerk, would not allow him "to suggest that appropriate circumstances exist warranting submission of his request for an extension of time to file for a rehearing to an *in banc* session of the court." Petition at 9. To the contrary, Kolbeck's Petition for Rehearing In Banc was submitted to and rejected by a three-judge panel of the court. *See* Appendix to Petition at A-8 through A-11. That the clerk may have submitted the rehearing petition to the court accompanied by a transmittal form treating the document as a "motion for reconsideration" of an earlier order did not deprive the petition of its character or its content. Petitioner's claim that he was denied access to the courts notwithstanding, the appellate record confirms both presentation and proper judicial consideration of Kolbeck's arguments.[2]

The order which affirmed judgment for General Motors Corporation was entered November 27, 1991. For a period of 14 days thereafter, counsel for petitioner was entitled as a matter of right to file a petition for rehearing. *Fed.R.App.P.* 40(a). When timely filed in the United States Court of Appeals for the Third Circuit, petitions for rehearing are circulated to all active circuit judges pursuant to Chapter 9 of the court's Internal Operating Procedures and 28 U.S.C. § 46. Petitioner's failure to pursue this opportunity cannot be excused, *ex*

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2. Petitioner has failed to include in his Appendix any of the substantive motions filed in the court of appeals, review of which demonstrates that the same substantive arguments which underlie the pending petition were twice presented to and rejected by three-judge panels. *See* Appellant's "Petition to Recall the Mandate" filed March 8, 1992 and Appellant's "Petition for Rehearing In Banc" filed April 27, 1992.

post facto, on transparent constitutional claims of lack of due process or denial of access to the courts.[3]

In his petition, which criticizes the procedure adopted by the court of appeals for disposition of rehearing petitions, Kolbeck now contends for the first time that his due process rights were abridged.[4] He relies heavily on this Court's decision in *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 73 S.Ct. 656, 97 L.Ed. 986 (1953), to support his position. Arguments similar if not identical to those advanced by Kolbeck here, however, were expressly rejected in *Western Pacific*. Interpreting the powers granted pursuant to 28 U.S.C. § 46, the Court observed that "§46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings en banc. It goes no further." *Id.*, 345 U.S. at 250. In terms applicable to

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3. Petitioner concedes that precedent interpreting the right of access to the courts addressed constitutional deprivations not in evidence here. Petition at 11, citing *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed. 2d 72 (1977). The right of access to the courts "is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579, 94 S.Ct. 2963, 2986, 41 L.Ed.2d 935 (1974). Kolbeck's various allegations, which do not rise to the level of fundamental constitutional rights, were "presented" on several occasions to the court of appeals.

4. The traditional rules of this Court preclude grant of certiorari when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. , 112 S.Ct. , 118 L.Ed.2d 352, 372 (1992) (Stevens, J. dissenting); *see Duignan v. United States*, 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996 (1927); *cf. Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. , 111 S.Ct. 2749, 115 L.Ed.2d 929, 949 n.8 (1992) (issues not presented to, but passed upon by, court of appeals may be reviewed by the Court). Assuming Kolbeck's characterization of the record to be accurate – which it is not – his claim that the actions of the clerk deprived him of his constitutional right of access to the courts should have been presented to a motion panel of the court of appeals. *See* Chapter 10, Internal Operating Procedures of the Court of Appeals for the Third Circuit.

Kolbeck's petition, the Court continued: "[Section 46(c)] neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing en banc. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." *Id.*

Reviewing the statute's legislative history, the Court emphasized that "the determination of how the en banc power was to be exercised was to rest with the court itself – litigants should be free to suggest that a particular case was appropriate for consideration by the full court, *but they should be given no right to compel all circuit judges to take formal action on the suggestion*." *Id.*, 345 U.S. at 252 (emphasis added); *see* 345 U.S. at 256-58. Recognizing the power of a court of appeals to "delegate the responsibility for the initiation of the en banc power to the divisions of the court," 345 U.S. at 261, this Court cautioned that counsel in such circumstances should be allowed "access to the few circuit judges who must act initially, and perhaps decisively, on the matter for the others." *Id.* at 262.

In this case, Mr. Kolbeck was twice allowed such access to a panel consisting of Circuit Judges Mansmann, Cowen and Higginbotham. On April 20, 1992, this panel reviewed and rejected Appellant's Petition to Recall the Mandate, and on June 11, 1992, the same panel denied Appellant's Petition for Rehearing In Banc (transmitted as a motion for reconsideration). Neither 28 U.S.C. § 46 nor the rulings of this Court require more.

II. The Court Of Appeals Properly Denied Petitioner's Requests To Recall The Mandate And Extend The Time For Rehearing.

The substantive basis for petitioner's request for rehearing in banc was a claimed intracircuit conflict over the admissibility of evidence relating to non-use of seat belts, as manifested in decisions in this case and in *Dillinger v. Caterpillar*. Should the Court overlook the

procedural and factual deficiencies in petitioner's case, it is nonetheless clear that the decisions in *Dillinger* and *Kolbeck* can be easily reconciled and do not mandate issuance of a writ of certiorari.[5]

Fundamentally, two critical distinctions differentiate the *Kolbeck* and *Dillinger* decisions. First, the reconstruction of the accident and theory of liability presented at this trial required the jury to infer that Mr. Kolbeck (who was seated in the right front seat) was not wearing his seat belt. *See* Kolbeck's Petition at 5 ("At the time of the accident, Mr. Kolbeck was a front-seat passenger. . . He alleges that he suffered his spinal cord injury when his head struck the rearview mirror assembly . . . ").

Kolbeck's petition, in its reliance on *Dillinger*, asks the Court to ignore the manner in which counsel tried his case. Unlike in *Dillinger*, where a product manufacturer defendant charged with having caused an accident sought to introduce evidence of seat belt non-use in an attempt to mitigate damages, it was the plaintiff here who placed that information before the jury. His claim necessitated that course, otherwise he would have been unable to explain the occupant kinematics which he believed demonstrated he struck the rearview mirror. Interestingly, a literal reading of the Pennsylvania Occupant Protection Act, *supra*, cited by Kolbeck, would have prevented him from meeting his burden of proof on causation. Kolbeck sought in the lower courts to apply the Pennsylvania statute only when it favored his posi-

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5. As noted in Respondent's Statement of the Case, *supra*, the substantive issue at the heart of Kolbeck's petition involves allegedly conflicting treatments of the Pennsylvania Occupant Protection Act. Such interpretations of state law matters generally do not support grant of certiorari by this Court. *See* Supreme Court Rule 10; *cf. Duncan v. Tennessee*, 405 U.S. 127, 31 L.Ed.2d 86, 92 S.Ct. 785 (1972) (writ of certiorari dismissed as improvidently granted where double jeopardy questions were so interrelated with state procedure as not to warrant exercise of discretionary jurisdiction).

tion; but being the party who introduced the disputed evidence, to argue for its preclusion was incongruous.[6]

The negligence claim so actively pursued by Mr. Kolbeck represents the second major distinguishing feature of this litigation. Plaintiff proceeded at trial on a negligence theory entirely separate from his product liability claim. He requested and received jury instructions on this issue from the trial judge, the Honorable Daniel H. Huyett, III. Mr. Coben's closing argument to the jury also repeated his negligence claims. Having elected this course, plaintiff could not close the record to evidence of his contributory negligence. Accordingly, the *Dillinger* court's review of the dichotomy in Pennsylvania law which forbids introduction of negligence concepts into a product liability action is inapplicable. The issue decided by Judge Huyett, whether Mr. Kolbeck's non-use of the seat belt was evidence of contributory negligence, was not even addressed in *Dillinger*. Therefore, the decisions do not conflict.[7]

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6. In terms of its effect on the outcome of the trial, the evidentiary issue is a false one. The principal disagreement between the parties was not whether Mr. Kolbeck was restrained or unrestrained, but what portion of the vehicle's interior he struck with his head. In his opening speech to the jury, and again in closing, counsel for Mr. Kolbeck identified the movement of his client's body within the vehicle after impact as the critical conflict between the parties, emphasizing that unless the jury found his client struck the rearview mirror, his case was lost. That essential issue was resolved in favor of General Motors Corporation. While finding the rearview mirror negligently and defectively manufactured, the jury decided against the plaintiff on causation.

7. Much of the *Dillinger* opinion is devoted to Pennsylvania case law which "refused to permit any evidence of negligence on the part of the plaintiff to be introduced to defeat a claim under" Section 402A of the Restatement (Second) of Torts. *Dillinger*, *supra*, 959 F.2d at 435. Although referencing and criticizing Judge Huyett's opinion in *Kolbeck*, the *Dillinger* panel did not address the presence of a negligence count in Mr. Kolbeck's complaint. Its analysis is confined solely to the traditional "refusal" of Pennsylvania courts to allow contributory negligence to be asserted as a defense in § 402A cases, and thus does not address the particular legal issue decided in *Kolbeck*. Judge Huyett's scholarly analysis of

Similarly, seat belt non-use as contributory fault was inconsequential. The jury did indeed find Mr. Kolbeck partially responsible for his injury, but it found no responsibility on the part of General Motors Corporation. The negligent manufacture of the rearview mirror was found not to be a substantial factor, not because Mr. Kolbeck failed to wear his seat belt, but because Kolbeck did not strike his head on the mirror. Simply put, plaintiff's cause was lost before the jury even considered the effect of his negligence.

NOTES *(Continued)*

this state law issue presents an additional obstacle to Kolbeck's petition, as this Court traditionally affords "great deference" to a district judge's determination of state law questions. ***See United States v. Hohri***, 482 U.S. 64, 74 n.6, 107 S.Ct. 2246, 96 L.Ed.2d 51 (1987); ***Bishop v. Wood***, 426 U.S. 341, 346 and n. 10, 96 S.Ct. 2074 (1976).

CONCLUSION

Petitioner's deliberate failure to avail himself of post-decision remedies should not be excused by this Court, particularly where petitioner's substantive claims were properly considered and decided by the lower federal courts. The court of appeals heard and rejected Kolbeck's "suggestion" for rehearing in banc, thus providing him with all of the process to which he was due.

For these reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: August 21, 1992